ORIGINAL

IN THE
SUPREME COURT
OF FLORIDA

NO. 74,987

IN RE PETITION TO AMEND
THE RULES REGARDING THE
FLORIDA BAR - ADVERTISING ISSUES

BRIEF OF CITIZENS AGAINST CENSORSHIP OPPOSING THE FLORIDA BAR'S PETITION TO AMEND THE RULES REGARDING ADVERTISING AND ALTERNATIVE MOTION TO REMAND THIS MATTER TO A SPECIAL MASTER TO MAKE FINDINGS OF FACT ANC CONCLUSIONS OF LAW REGARDING WHETHER THE BAR'S "RECORD" PROVIDES EVIDENCE OF THE SUBSTANTIAL INTEREST I T CLAIMS

BRUCE ROGOW
Florida Ear No. 067999
2441 S.W. 28th Avenue
Fort Lauderdale, Florida 33312
(305) 524-2465

Counsel for Citizens Against
Censorship

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd)

OTHER

TABLE OF CITATIONS (cont'd)

THE INTEREST OF CITIZENS AGAINST CENSORSHIP

Citizens Against Censorship (CAC) is an organization comprised primarily of Florida lawyers who utilize television, radio, yellow page and direct mail advertising. The organization was formed in the Spring of 1989, when it became clear that the Bar was intent on recommending changes to the Rules of Professional Conduct regulating advertising. The organization submits this Brief opposing the Rule changes and respectfully requests that the Court consider it, along with the other submissions of individual members of the Ear and interested organizations asking this Court to deny the Ear's Petition To Amend the Rules regulating advertising.

SUMMARY OF THE ARGUMENT

"Lawyer advertising is in the category of constitutionally protected commercial speech." Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1988); Bates v. State Ear of Arizona, 433 U.S. 350 (1977).

Such speech can be restricted only if the state can prove that its regulations serve a substantial governmental interest and that the proposed rules are narrowly tailored to serve that interest. Board of Trustees of the State Univ. of New York v. Fox, ___U.S.___, 109 S.Ct. 3028,3035 (1989).

The Bar's proposed rules fail both tests. First, its "record" does not support its conclusions that lawyer advertising adversely affects the administration of justice or

fair jury trials. That record is self-serving, anecdotal, unreliable, and, upon close readings, The Bar "studies" confirm that there is no basis for The Bar's conclusions. The opponents' data, such as reported decisions, court generated statistics and insurance industry statistics offer more reliable evidence of the beneficial effect of lawyer advertising. At the least, if The Bar's "record" is to be considered, it must be subjected to confrontation and cross-examination before this Court could rely on any "fact" offered by The Bar.

Second, The Bar's proposals are not narrowly tailored. They are an unprecedented series of large and small obstacles designed to do away with effective and protected commercial speech. Proposed rules requiring disclaimers, duplicative cost information, office locations, prior submission of copy, no dramatizations, no testimonials, no illustrations unless "factually substantiated," single voices, lawyer voices, limited music and fee forfeitures do not reflect an effort to operate carefully within the confines of the First Amendment and Article I, §4 of the Florida Constitution. They constitute burdens on protected speech which are inconsistent with established case law, and unsupported by any case law -- state or federal.

Therefore this Court should deny The Bar's Petition To Amend The Rules Regarding Advertising, or at a minimum, remand the matter to a Special Master for findings of fact relating to The Bar's alleged "substantial interest."

STATEMENT OF THE CASE AND "FACTS"

THE CASE

The Florida Bar asks this Court to approve numerous amendments to the Rules of Professional Conduct regarding lawyer advertising. The proposed changes were initially adopted by the Board of Governors on July 20, 1989 at its Marco Island meeting, and finally approved by the Board of Governors on September 22, 1989. The proposed amendments go beyond the regulations in force in any state. They not only regulate content and discriminate between different mediums of expression, but they also mandate inclusion of a statement that "The hiring of a lawyer is an important decision that should not be based solely on advertisments," forcing an advertiser to thus advertise against the use of advertising. See, Proposed Amendment to Rule 4-7.2, new subsection (b).

The history leading to the Bar's pending Petition is sketched in an affidavit of Benjamin H. Hill, III, the 1991 President Elect of the Bar. Appendix A(1) to the Petition of the Bar.[1/] Mr. Hill's affidavit sums up the Bar's efforts

1/ That Appendix of nearly 3,000 pages is referred to hereafter as the "Record." On December 14, 1989, The Bar submitted this Record containing numerous appendices, and the interested parties, including the Bar, have always referred to these documents as the Record. See, "Joint Motion Of Citizens Against Censorship, The Florida Association Of Broadcasters And The National Assocation Of Broadcasters To Compel The Florida Bar To Provide The Record Supporting The Bar's Petition To Amend..." and the "Joint Motion Of The Florida Bar [and other interested parties] To Extend The Time For Filing Briefs..." because of The Bar's tardy submission of its "voluminous Record."

and conclusions this way:

> [The Bar] continued its work by trying to ascertain through surveys, studies of experiences in other states, work performed by the Academy of Florida Trial Lawyers and others, and through the input of hundreds of letters, newspaper articles, and other relevant data whether advertising was having any effect on the administration of justice and the confidence of the people in our legal system.... The conclusion was inescapable: certain lawyer advertising was creating many abuses and was having an adverse effect on the administration of justice and was undermining the confidence of the public in the legal system.
>
> Hill Affidavit, App. A(1), p.4.

Mr. Hill placed great weight and emphasis on the Record:

> The record which is attached was developed, assembled and relied upon by the Solicitation Committee, the Advertising Commission, and the Advertising and Solicitation Commission as they worked towards the preparation of the rules which are now before the Florida Supreme Court. The record clearly demonstrates the adverse effect which advertisins and solicitation are having, including an adverse effect upon the Administration of justice and our legal system.
>
> Hill Affidavit, ~~Id.~~ p.7. (emphasis supplied).

Mr. Hill's emphasis of "record" support for his "inescapable" conclusions is an attempt to conform to Supreme Court precedent which protects lawyer advertising as a form of commercial speech, unless the speech has been proven to be

false or misleading. Shapero v. Kentucky Bar Association, 486 U.S. 466, 108 S.Ct. 1916, 1925 (1988). See also, The Florida Bar v. Fetterman, 439 So.2d 835 (Fla. 1983):

> "Truthful advertising related to lawful activities is entitled to the protection of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions."
>
> Id. at 840 (quoting Matter of RMI, 455 U.S. 191, 102 S.Ct. 929,937 (1982)) (emphasis provided by The Florida Supreme Court).

The critical importance of a properly developed and reliable "record" is confirmed by the Supreme Court of the United States' most recent statement demanding that restraints of commercial speech require

> ...the governmental aoal to be substantial and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, Zauderer [v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1988)] at 647, it must affirmatively establish the fit we require.
>
> Board of Trustees of the State Univ. of New York v. Fox, ___U.S.___, 109 S.Ct. 3028,3035 (1989) (emphasis supplied).

The Bar's objectives were stated in its Petition:

> [C]ertain types of advertising create the risk of practices that are misleading or over-reaching, that can create unwarranted expectations by laymen, or

> that can adversely affect the public's confidence and trust in our judicial system.
>
> Petition Of The Florida Bar To Amend The Rules Regulating The Florida Bar -- Advertising Issues, p.3.

One proposed rule (4-7.2(b)) is limited to the electronic media which the Bar believes to possess "unique and powerful characteristics mak[ing] them especially susceptible to abuse and especially subject to regulation in the public interest." Petition of The Bar, p.4.

We turn to the Bar's "Record" allegedly supporting this and its other "conclusions."

THE "FACTS" AND THE MOTION OF CAC TO REMAND THIS MATTER TO A SPECIAL MASTER TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING WHETHER THE BAR'S "RECORD" PROVIDES FACTS SUPPORTING THE SUBSTANTIAL INTEREST IT MUST DEMONSTRATE TO RESTRICT COMMERCIAL SPEECH

A. The "FACTS" in this Record

The Bar should be embarrassed by its Record, especially regarding electronic media restrictions. We begin with Appendix C(1), an "Audio Tape Interview With Carl Hiassen."

THE CARL HIAASEN INTERVIEW (BAR APPENDIX L(1))

As part of its Record, The Florida Bar submits a recording of a National Public Radio interview with Carl Hiaasen, a Miami Herald columnist. The interview was prompted by Hiaasen's new book, Skin Tight (G. P. Putnam's Sons, 1989), a satirical mystery novel set in Miami. The Bar apparently believes that the interview's brief mention

of one of the book's characters, "Kipper Garth," a billboard advertising lawyer, is important evidence of the threat to the administration of justice caused by lawyer advertising.

Using Hiaasen's humor as part of a record of substantial state interests justifying curtailment of commercial speech would be amusing, if the stakes were not so serious. Had The Bar read the book, rather than listened to the interview, it would have learned that Hiaasen spears many people and professions: a Dade County judge whose "specialty was shaking down defense lawyers in exchange for ridiculous bond reductions" (Skin Tight, p.21); a state administrative hearing officer, "some schlump civil servant," who is easily bribed (p.95); "downtown bankers [and] zoning lawyers" who bribe Dade County Commissioners (p.161); Dade County Commissioners who all have bank accounts "in the Caymans...except for [one] who was trying out a phony blind trust in the Dominican Republic" (p.96); "the beauty of the medical profession -- once you got your degree, you could try whatever you damn well pleased, from brain surgery to gynecology" (p.72); and a plastic surgeon, "Dr. Graveline," whose specialty was murder, fraud and fornication (passim).

Turning Hiaasen's Skin Tight humor into a Court Exhibit is indicative of the Bar's thin-skinned attitude toward the subject of lawyer advertising, and its insensitivity to the important First Amendment rights it seeks to chill. The rest of the Bar's "Record" is little better than its Hiaasen submission.

THE FLORIDA BAR HARVEY MOORE STUDY
(BAR APPENDIX C(14))

One of the studies commissioned by and relied upon by The Florida Bar, and the only study specifically mentioned in the Hill Affidavit, is Television Advertising By Attorneys: An Evaluation Of Its Impact On The Public, by Harvey A. Moore. This unpublished report was prepared in September, 1989, after the proposed rules were approved by the Board of Governors at their July, 1989 Marco Island meeting.?' It is the antithesis of the scientific method to devise a study to support a conclusion, rather than to draw conclusions from scientifically valid studies. Moore's study violated this, and other accepted social science norms. Moore himself described his methods as "quasi-experimental" (p.i) with "ostensibly weak experimental intervention" (p.ii). We have submitted affidavits from respected academics attesting to the dangers of giving any weight to the Moore study. (CAC App. 1; Affidavits of Drs. Dawkins and Price, and letter of Dr. Cox and Tom Lee). The Affidavits and letters attest to flaws which are self-evident.

First, the Moore study is based on an unreliable sample. The 22 participants in the study were described as having been "selected to provide as much variety in social background characteristics as possible." (p.3). However all the participants were college students.

In Section I of the study, this "variety" was evi-

2/ See, The Florida Bar News, Aug. 1, 1989, headlining "Bar Okays Strict Lawyer Ad Regulations," and picturing Florida Bar President Steve Zack and Ben Hill III "explain[ing] Bar proposals at a July 25 press conference in Tallahassee."

denced by the selection of six males and sixteen females. All members of the first group of eleven participants were under 30 years old ("most were probably under 25") (p.3) -- apparently the ages were not recorded -- while the second group included a "wider" range (p.3). The width of this range is not reported. The inclusion of two black males in an otherwise white group of 22 was as much racial variety as it was possible for Moore and his colleagues to achieve.

In Section II of the study, using 196 college students, only the percentage of males and females was improved (47% and 53%, respectively). (p.13). Again, the group was largely young (93% under age 26) and non-Hispanic white (80%).

Moore noted that the study participants exhibited a "negative and skeptical attitude toward all television commercials." (p.9) (emphasis supplied). Some group members also entered the study with pre-existing negative attitudes toward lawyers. (p.9). Naturally, these negative biases are most undesirable in individuals evaluating lawyer television advertising.

Neither Section I nor Section II of the study was representative of Florida television viewers in general, or those likely to select an attorney through television advertising, in particular.[3/] However, Moore justifies this limitation by an inconspicuous, but telling disclaimer, "[t]here is no intention of generalizing these results to any larger population." (p.13) (emphasis supplied). That disclaimer

3/ See, ABA Commission On Advertising Report To The House Of Delegates (1988) describing the likely clients as middle and low income. (CAC App. 4).

is enough to discard Moore as a credible source of evidence in this case.

Nevertheless, in the "Executive Summary" of his results, Moore does make a quantum leap from his small study group to a much larger population, stating,

> If [viewers' (of television advertising)] support, confidence and trust in the law is reduced by these commercials, as was the predominant reaction of subjects in this research, then society suffers a grave harm which must be evaluated carefully against the putative benefits of broader advertising. (p.ii) (emphasis supplied).

An objective evaluation of Moore's study, and Moore's own words, demonstrate a lack of credibility on Moore's part, and on the part of The Bar by submitting Moore as evidence of its "substantial interest."[4/]

4/ In addition, Moore's analysis of his results lacks objectivity. Assuming, arguendo, that the results have meaning beyond the study group itself, a fair analysis of the data shows no meaningful differences between viewers and non-viewers of selected televised advertisements.

Moore's comments focus on the extreme responses, which represent a small minority of respondents. He overemphasizes slight anti-advertising results (pp.15,17,18) and minimizes or ignores pro-advertising or neutral results (pp.19,22).

Given the wide margin of error due to the experimental design (see CAC App. 1, Affidavits of Drs. Dawkins and Price and Lee and Cox), slight differences, whether pro or con, cannot be attributed to advertising. Examining the positive or negative trend in the results, rather than the extremes, reveals some negative feeling about attorneys, but unrelated to advertising. Moore's analytical approach was outcome-oriented and his conclusions are not substantiated.

Number-crunching aside, certain results are obviously misrepresented. While 87.9% of Moore's non-viewers and 84.6% of Moore's viewers thought that most lawyers would represent clients they knew to be lying, Moore misstated his data and incorrectly reported that "even a brief exposure to television commercials seems to increase this [negative] perception." (p.20) (emphasis supplied).

THE S. MYERS NEVADA STUDY
BAR APPENDIX C(9)

Stefanie Myers' 1988 University of Nevada, Las Vegas Master's thesis is a primary Bar submission regarding television advertising. Myers, Attorney Advertising: The Effect On Juror Perceptions And Verdicts (May, 1988). Myers interviewed thirty Nevada jurors in six trials where the plaintiff's lawyer advertised on television, finding that jurors favored the defense in those cases. However, Myers' work is admitted, by her, to be unreliable regarding the very conclusion which The Bar urges upon this Court. Perhaps The Bar did not read to page 62 of her study, where Myers wrote:

> Because the main conclusion of the research involved jury verdicts when the plaintiff's lawyer was a television advertiser, results would have had more validity with a larger number of advertising attorneys included in the survey. There were only a total. of thirty respondent jurors in six trials with a plaintiff's lawyer who was also a television advertiser. It could be that these six trials were not representative of personal injury trials; perhaps these particular six cases did not have the most convincing evidence and would have ended in defense verdicts whether the plaintiff's lawyer was a television advertiser or not. No determination could be made from the data concerning the probable outcome of those particular trials independent of the advertising factor. Also, jurors should have been asked if they recognized any of the lawyers in their trial as television advertisers. Because they were not, no determination could be made from the data whether jurors voted against the

> plaintiff's attorney because he/she was a television advertiser or whether those jurors were even aware that he/she advertised at all.

The Myers "study" carries no weight in Nevada; it is meaningless in Florida.

THE FLORIDA CIRCUIT JUDGES QUESTIONNAIRE (BAR APPENDIX C(6))

Two hundred sixty-one of three hundred sixty judges were asked the following three questions:

> (1) Have you had any potential juror, witness or other party express any opinion concerning advertising by lawyers during any part of a trial?
>
> (2) Have you observed any changes in the public's perception of the judicial system or the attorneys working within the judicial system which you attribute to lawyer advertising in whole or in part?
>
> (3) In your opinion, has lawyer advertising had an impact on the public's confidence in the administration of justice?
>
> Florida Circuit Judges Questionnaire, Bar App. C(6), p.1.

The affidavit of Dr. Marvin Dawkins (CAC App. 1) discusses why the questionnaire proves nothing with regard to television advertising, radio advertising, direct mail advertising or yellow page advertising. The questions were not designed to elicit information regarding different types of advertising, choosing instead to lump "advertising" together as a generic term. Nor do the questions attempt to provide insights into how the specific rules now proposed by

The Bar will address any of the anecdotal concerns noted by the Judges. In short, the Questionnaire is long on judges' personal feelings and short on evidence of the kind of substantial state interest justifying severe restraints on commercial speech. The 37 "Selected Comments" from named judges and one "anonymous" judge reflect the antipathy of those judges but are silent as to the views of the rest. The "selectivity" of the record lends credence to our submission that the Bar's "evidence" lacks both weight and reliability.

JUROR RESPONSES (BAR APPENDIX E(4))

Appendix E(4), Juror Responses, demonstrates The Bar's disingenuousness and its inability to develop the requisite record for its proposed regulations.

The first item in E(4) is a two-page letter from a Las Vegas lawyer to a member of The Bar's Advertising Committee touting the Stephanie Myers "study," despite Myers' own doubts about the utility of her data. Obviously the letter has nothing to do with the Appendix title of Juror Responses, assigned to it by The Bar.

The second part of E(4) is a seven-page transcript reflecting the voir dire responses of two Orlando jurors telling an advertising lawyer that he should not advertise on television and that they could not therefore be "completely objective" with the lawyer, but that they would not hold their feelings about the lawyer "against the client." App. E(4), pp.6-7 (22 and 23 as numbered on transcript).

Thus E(4), Juror Responses, reflects two jurors' animosity toward the exercise of a constitutional right; the jurors' ability to not let that adversely affect their duty to give a client a fair trial; and the utility of the voir dire process in protecting clients from negative feelings jurors may have vis a vis any lawyer. If E(4) proves anything, it proves that the jury system is alive and well.

The Bar's submission of Juror Responses belies Ben Hill's view that the administration of justice is adversely affected by lawyer advertising. The Bar's record, especially with regard to television advertising, against which the Bar makes its strongest "charges," is devoid of competent evidence supporting the "inescapable conclusion" the Bar is trying to sell to this Court.?'

5/ Not a scintilla of material in the record supports any conclusion about the electronic media's "unique and powerful characteristics mak[ing] them especially susceptible to abuse...." Petition, p.4.

The rest of the "Record" can be reviewed and disposed of relatively quickly. Indeed, much of it supports our position, not The Bar's.

Bar Appendix A(2), the Bar Leaders Background Booklet is a public relations handout prepared by The Bar's Department of Public Information. Appendix B is merely a collection of hundreds of newspaper clippings, leading off with a 1986 Andy Rooney column in which the 60 Minutes humorist differs with the United States Supreme Court's view that lawyer advertising is protected by the First Amendment. Appendix C(1) is a seven-year old (1983) study "conducted with a representative sample of 126 respondents from Linn County, Iowa." The study, Attitudes and Opinions Toward Advertising

continued on next page.. ..

5/ continued from prior page .....

for Law Firms claims no 1990 validity, nor any reason for believing its conclusions are applicable to the uniquely heterogeneous population of Florida.

Appendix C(2) is The Florida Bar's Communications Audit (May, 1985) used by The Bar for "defining [its] goals." (Executive Summary, p.1). The audit canvasses many of the Ear's problems, but the final page, on advertising, must not have been read by The Bar before it used it to support its "inescapable" conclusions. The Audit's authors wrote:

> Thus there is no support for The Florida Bar attempting to regulate or dictate specifications for lawyer advertising.

Bar App. C(2), last page. The authors suggested "guidelines," more in tune with the "Aspirational Goals" adopted by the American Bar Association Commission on Advertising in August, 1988. (CAC App. 2 and 4).

Appendix C(3) is a report to The Bar about its own public service announcements, not about lawyer advertising. C(4) is a 1987 report on Attitudes & Opinions of Florida Adults Toward Direct Mail Advertising By Attorneys. It is irrelevant to television, radio, newspaper, magazine, yellow page or any other form of advertising. Appendix C(5), Lee, Lawyer Advertising: Consumer Attitudes, Response Patterns, and Motivation Factors (1987) is an in-depth report supporting advertising. Indeed, Mr. Lee has submitted a letter (CAC App. 1) demonstrating the ineptitude of The Bar's primary evidence, the Moore "Study." C(17) is a 2-page Memo to Ben Hill from Stephen Masterson regarding focus groups' purported views on lawyer advertising. Aside from the fact that such a memo proves nothing, Mr. Lee's letter (CAC App. 1) explains the shortcomings of "focus groups" generally.

Appendix C(8) is an Iowa, 1988 report called Consumer Attitudes Toward Yellow Pages Legal Advertising. It yields nothing regarding Florida television, radio or other forms of advertising. It was based upon a "sample of approximately 100 Iowa adults." C(8), p.2. Appendix C(9) is the S. Myers Nevada study, discussed above because it does relate to television, and it, in the author's own words, is unreliable. Ms. Myers concedes "There exists a paucity of literature on this subject." (C(9), p.63. The Florida Bar apparently was not dissuaded from its "inescapable" conclusions by the caveat of its claimed major source.

continued on next page ....

5/ continued from prior page ....

Appendix C(10) is a May, 1988 apparently Bar-commissioned survey on lawyer advertising which concluded "A strong majority of the voters (59%) believe lawyer advertising on television is bad for the public." The posed highly negative and suggestive questions are characteristic of The Bar's style of research and demonstrate the reasons why The Bar's "studies" should be rejected or subjected to cross examination. The respondents were asked, inter alia if they agreed or disagreed with these statements (caps in original) (App. C(10, p.5):

> ONE BIG PROBLEM WITH LAWYER ADVERTISING ON T.V. IS THAT THE COMMERCIALS ARE SO POORLY DONE, THAT IT GIVES ALL LAWYERS A BAD IMAGE.
>
> * * *
>
> LAWYERS WHO ADVERTISE ON TELEVISION ARE NOT REALLY COMPETENT OR THEY WOULD NOT HAVE TO ADVERTISE TO GET CLIENTS.
>
> * * *
>
> LAWYERS WHO ADVERTISE ON T.V. REMIND ME OF USED CAR SALESMEN.

Appendix C(10) is a "Draft" of an ABA meeting speech on advertising. (The actual text may differ). Appendix C(12) is The Bar's survey of its own ads. Appendix C(13) is something called AFTL, The Civil Jury Study Seminar (1988). A series of "surveys" touch a lot of bases, two of which are of interest. One showed an unfavorable public view of lawyer television ads primarily because they "encourage lawsuits." (p.11). The respondents were not asked if they supported access to the courts or the right to seek redress for legal wrongs. The other survey asked "What is the worst thing you can say about lawyers?" The responses showed advertising was far from the respondents' minds: 17% said "fees too high"; 13% said "greedy"; 11% said "corrupt, dishonest, crooks." Defenders of the guilty got 5% of the worst responses, and a host of other negative comments preceeded the 3% who thought the worst thing about lawyers is that "they advertise." C(13), p.7. Appendix C(14), the Moore study, is discussed in detail in the body of this Brief.

continued on next page ....

5/ continued from prior page ....

Appendix C(15) is the handwritten informal survey of a Board of Governors Public Member. Her responses showed that 40 of 52 persons supported advertising because this is a "free country: why not?" While none of the 62 people Ms. Tribble spoke to would hire a lawyer from a T.V. ad, her recorded comments were "Someone who doesn't know might need the info [provided by the ad]." Appendix D(1)-(5) is a collection of lawyer marketing information, including one marketer's "moth to a flame" (D(3)) pitch. Appendix E (1) and (2) are pamphlets on commercial writing and advertising; E(3) are undated transcripts of commercials; E(4) is the 1 jury response discussed in the body of this Brief; E(5) are nine "Public Complaints" -- presumably the only letters written to the Bar about advertising between October, 1987 (the earliest), and October, 1989 (the latest letter).

Appendix E(6) which the Bar lists in its Table of Contents as "Dramatizations" is one New York Times article about NBC discontinuing dramatizations on its news shows. Appendix (F), "Newspaper Advertisements," are undated xeroxes of two ads the Bar apparently dislikes.

Appendix G deals exclusively with yellow page advertisements. Appendix H(1)and(2) relate generally to lawyer discipline processes. The data relevant to this case is supplied by us in CAC App. 3. Appendix H(3) shows amounts spent by some television advertisers, and attached materials include a 10 year old (1980) report on post-Bates advertising in Florida. Appendix H(4) is a one-page statement regarding the number of direct mail letters sent in Florida. Appendix H(5) is Bar Counsel John Berry's affidavit (see Brief footnote 12), supporting our position that lawyer advertising poses no disciplinary problems.

Appendix I is all Direct Mail material. Appendix J is all Direct Mail related. Appendix K is Briefs and other materials relating to Alabama, California, Tennessee, Iowa and New Jersey. Appendix L is "Miscellaneous" material, including the Carl Hiaasen interview and the list of those to whom the Bar sent its "New Advertising Rules."

THE ALTERNATIVE MOTION TO REMAND TO A SPECIAL MASTER

The Court has a special role in a case such as this. It sits as a body which can enact legislation recommended by the Florida Bar, and it sits as a Court which can declare proposed Bar legislation invalid under the Florida and United States Constitutions. Thus its role is both legislative and adjudicative.

In this case the opponents of the proposed legislation are asking the Court to adjudicate their rights under the state and federal constitutions. The governing standards of judicial review require that the Court follow a four-part analysis.

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether or not it is more extensive than necessary to serve that interest.
>
> Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980). (emphasis supplied).

See also, The Florida Bar v. Fetterman, 439 So.2d 835 (Fla. 1983). The test for measuring the fit between the substantial interest and the regulation requires the Court to

determine if the regulation is "a means narrowly tailored to achieve the desired objective." Board of Trustees of the State Univ. of New York v. Fox, ___U.S.___, 109 S.Ct. at 3035. (emphasis supplied).

If this case were being tried like most lawsuits challenging the constitutionality of legislation, the ultimate evidentiary burden would be on The Bar to demonstrate both a reliable basis for its "substantial interest," and how the regulations meet the "narrowly tailored" test.

The trial would permit discovery and cross-examination of The Bar's witnesses and "experts" to demonstrate bias, flawed methodology, baseless conclusions. The plaintiff opponents would be allowed to present their own evidentiary testimony and it too would be subjected to cross-examination scrutiny. A finder of fact would, based upon properly presented evidence, be able to determine if the electronic media are "easily abused" and its "passive" listeners subjected to extraordinary pressures.?' The finder of fact would be able to determine whether sufficient competent evidence supports The Bar's "inescapable" conclusion that lawyer advertising (which kind?) "was having an adverse effect on the administration of justice and was undermining the confidence of the public in the legal system." Hill Affidavit, App. A(1), p.4.

Because this case is being "tried" in this Court -- the

6/ The way the Bar hyperbolizes, one would think that a hand reaches out of a television set or radio and grabs listeners/viewers by the neck, dragging them into a law office to be "signed up."

Florida Supreme Court -- there has been no opportunity to test The Bar's "evidence" in the crucible of confrontation and cross-examination. We have submitted to the Court (CAC App. 3) powerful data and reported cases which demonstrate (a) that advertising is not the cause of the legal profession's image problem and (b) the failings of The Bar's record. (See, discussion at pp.12-15(N.5), infra, and CAC Appendix). While we believe in those submissions, they, like the Bar's evidence are one side's submissions.

Due process of law requires more. Where, as here, this Court is sitting as an adjudicative body, mandated to determine whether The Bar's proposed rules pass state and federal constitutional muster, the right to be heard must include the right to a record composed of more than commissioned "studies," anecdotes, newspaper clippings, and self-serving affidavits.

The essential element of due process of law is the right to be heard. Grannis v. Ordean, 234 U.S. 385 (1914); State v. Smith, 547 So.2d 131,134 (Fla. 1989). What process is due depends upon the facts and circumstances of the particular case. Logan v. Zimmerman Brush Co., 455 U.S. 422,429 (1982); Metropolitan Dade Co. Fair Housing and Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc., 511 So.2d 962,967 (Fla. 1987). Compare, Petition of Felmeister & Isaacs, 518 A.2d 188,191, 203 (N.J. 1986) ("Record proof [not 'anecdotes'] is required") (emphasis in original). See discussion of Felmeister, infra.

This case involves restrictions upon a fundamental

state and federal constitutional right. In The Florida Bar v. Fetterman, 439 So.2d 835 (Fla. 1983), this Court acknowledged its concern for "the delicate balance between constitutional freedom of expression and legitimate unrestrained exercise of that privilege." In Fetterman, the Court rejected findings of fact and recommendations made by a Referee after a full adversarial hearing, saying:

> The Bar has failed to establish to this Court's satisfaction the requisite substantial justification for the attempted restraint on respondent's use of "The Law Team, Fetterman and Associates." RMJ; Central Hudson Gas, 447 U.S. at 563-564...Bates, 443 U.S. at 350.
>
> Fetterman, 439 So.2d at 840.[7/]

If due process requires that Mr. Fetterman and all Bar members have a chance to develop a record before they can be disciplined by this Court, then due process must require that proposed rules which would limit Bar members' First Amendment and Article I, §4 rights must be subject to meaningful examination before they are presented to this Court.

We argue that the Bar's "Record" utterly fails to support, by any standard of measurement of competent evience, the conclusions it urges upon this Court. But if the Court is inclined to consider at all The Bar's "evidentiary"

7/ The Court did find one of Fetterman's radio ads to have contained "sensational" language but imposed no sanctions because the ads were no longer used. Fetterman thus demonstrates that the present rules can work, a point we enlarge upon at p.27, infra.

submission, it should do so only after a Special Master is appointed to conduct a hearing or hearings in which The Bar's "evidence" (and the opponents' evidence) can be tested by means consistent with due process of law.

For that reason, as an alternative to simply rejecting the Bar's proposed Rules for the reasons we articulate infra, we ask that the Court appoint a Special Master and remand this case to him or her with instructions to make findings of fact regarding The Bar's burden of establishing its "substantial interest," and whether its proposed rules are "narrowly tailored" to remedy the evils it perceives in lawyer advertising.

The argument we make below regarding the truly quantifiable record regarding advertising and its non-effect upon the administration of justice supports both facets of the opponents' submission. First it presents a real record of competent evidence negating The Bar's self-serving studies and anecdotes, and second, it demonstrates that there are, at the least, disputed issues of fact in this case making a remand for fact-finding the classic and proper way for adjudicating this kind of constitutional dispute.[8/]

8/ Compare, Askew v. Hargrave, 401 U.S. 476,478 (1971), where the Supreme Court condemned constitutional decision-making without a properly developed record: "Since the manner in which the program operates may be critical...that claim should not be decided without fully developing the factual record at a hearing." In IDK, Inc. v. Clark County, 836 F.2d 1185 (9th Cir. 1988), the Court wrote: "Summary Judgment in cases involving constitutional issues is often undesirable because a court benefits from a well-developed record when deciding complex and important questions." Id. at 1189.

THE PUBLIC PERCEPTION OF THE LEGAL PROFESSION IS BASED ON FACTORS OTHER THAN LAWYER ADVERTISING, AND SUCH ADVERTISING HAS NOT DIMINISHED EITHER THE PUBLIC'S DESIRE FOR LITIGATION OR THE ADMINISTRATION OF JUSTICE

A. Public Reprimands and More Serious Sanctions of Attorneys by The Florida Bar are in Response to a Variety of Unethical and Illegal Conduct, and are Virtually Never Related to Lawyer Advertisins

The Florida Bar currently has regulations which are adequate to prevent the inappropriate use of advertisements which are false or misleading.[9/] Attorneys who violate

9/ See, inter alia Rules 4-7.1(a)-(c) and 4-7.3(e):

> A lawyer shall not make or permit to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> (a) Contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;
>
> (b) Is likely to create an unjustified expectation about results the lawyer can achieve or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
>
> (c) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.
>
> (e) Any factual statement contained in any advertisement or any information furnished to a prospective client under this rule shall not be:
>
> (1) Directly false or misleading;
> (2) Impliedly false or misleading;
> (3) Fail to disclose material information;
> (4) Unsubstantiated in fact; or
> (5) Unfair.

these bounds are subject to public reprimands and other, more serious disciplinary procedures brought by The Bar and approved by this Court. A review of cases reported in Southern 2d through January 1, 1990 reveals that since 1978, after Bates v. State Bar of Arizona, 433 U.S. 350 (1977), opened the door for lawyer advertising, the Florida Bar and this Court have issued 343 public reprimands or more serious sanctions following disciplinary proceedings, and only three of those involved advertising.[10/] The extent and kind of the reported other misconduct is compelling evidence that negative public perceptions of the profession are based on factors unrelated to Bates and its progeny. Poor images of lawyers are formed by their serious misconduct -- misconduct

10/ A fourth case is The Florida Bar v. Schreiber, 420 So.2d 599 (Fla. 1982), vacating 407 So.2d 595 (Fla. 1981). Following the United States Supreme Court's opinion in In re R.M.J., 455 U.S. 191, 102 S.Ct. 929 (1982), the cause against Schreiber for direct-mail solicitation was dismissed.

The 343 cases were the product of a Westlaw computer search using the following query: sy(lawyer attorney /p disciplin!) & ti("Florida Bar") & da(aft 1-1-78). This retrieved all cases since January 1, 1978 which contained "Florida Bar" in the title of the case, and which included either "lawyer" or "attorney" in the same paragraph as words such as "discipline" or "disciplinary" in the case synopsis. The word "advertising" and related words were then located in the text of the reported cases.

reported in the Southern Reporter and the public press.[11/]

This conclusion is supported by The Florida Bar's own survey, Television Advertising By Attorneys: An Evaluation Of Its Impact On The Public, prepared by Harvey Moore in September, 1989 (Bar Appendix C(14)). Moore concluded:

> The public does not appear to have a high level of confidence in the honesty of lawyers. A plurality view them with ambivalence, but more tend to believe they are dishonest. Exposure to the commercials had a relatively small effect.

Id., p.17. In fact, according to Moore, while 30.6% of those who had seen lawyers' television commercials viewed attorneys as somewhat or very dishonest, even more of those who had not seen the commercials, 33.3%, had a similar opinion. These numbers, while discouraging, reinforce the conclusion that advertising is not the culprit.

To examine the types of misconduct upon which the Florida public does base its opinion, approximately 200 of the most recent disciplinary cases resulting in public reprimand from 1986 through 1989 were broadly categorized.

11/ See, for example, some recent stories under the following headlines: "Lawyer is freed on bail -- Pleads not guilty to fraud charges"; "Ex lawyer surrenders on RICO charge" (Miami Herald, January 3, 1990, p.2BR); "Sunrise lawyer arrested while out on bail" (Miami Herald, January 12, 1990, p. 2BR); "Miami attorney resigns"; "Gables Attorney resigns" (Miami Review, January 8, 1990) (The Miami attorney sold a client's business, keeping the $2500 profit and misappropriating the $147 his client gave him to pay real estate taxes; the Coral Gables lawyer misappropriated a client's $102,866 mortgage payment.)

(CAC App. 3). The largest group encompassed various types of financial misconduct (50), followed by neglect of legal matters (40). Other major problem areas included misrepresentations to a client or to the court (23), drug violations (16), fraud (13), conflicts of interest (9), and convictions for criminal activities (9). The remaining categories are permutations of unbecoming behavior that also serve to diminish the public perception of attorneys, including, but not limited to, perjury, contempt of court, sexual misconduct, chemical dependency, and incompetent representation. Considering this evidence, the Bar cannot point its regulatory finger at advertising as the source of the profession's public image problem. In a July 16, 1989 article which described the proposed restrictions on advertising as "a blow to consumers," the St. Petersburg Times said,

> If lawyers are concerned about their image, and there is sufficient cause for such concern, surely they have more substantive matters to address [than advertising]. (p.2D)

The few reported disciplinary cases which did involve advertising do not justify the Bar's effort to limit First Amendment rights. In The Florida Bar v. Kaiser, 397 So.2d 1132 (Fla. 1981), the respondent was a New York attorney, not a member of The Florida Bar. A partner in his Miami office was a Florida attorney. Kaiser advertised in the Miami telephone books, on television, and in the

newspapers, with the implication that he was authorized to practice in Florida. The Bar charged him with the unauthorized practice of law and enjoined him from further misleading advertising, but did not restrict his practice of law. Kaiser agreed to comply with the injunction and to eliminate all misleading advertising.

Another out-of-state attorney was disciplined for misleading advertising in The Florida Bar v. Bennett, 485 So.2d 1271 (Fla. 1986). Bennett's New Jersey law practice advertised nationwide for insurance subrogation claims, and misleading advertising was one of a multitude of violations charged by the Bar. Although he denied any unethical conduct and had defenses to the disciplinary complaints, Bennett chose to resign from the Florida Bar rather than defend against the complaints, since he had not at that time practiced in Florida for over two years. There were no allegations that any clients suffered any loss or were prejudiced by Bennett's conduct.

The most recent case, The Florida Bar v. Pascoe, 526 So.2d 912 (Fla. 1988), involved, among other complaints, an unethical newspaper advertisement that ran only one time. The advertisement related to divorce, and was said to contain "garish and sensational language," to involve "showmanship and hucksterism," and to appeal to lay persons' desire for "revenge or spite." Id. at 913. If the advertisement was truly objectionable, this case establishes that the existing regulations are effective at protecting the public

and the profession, since Pascoe immediately pulled the advertisement at the Bar's request. The advertisement itself warranted only a private reprimand, but a majority of the Court objected to a letter from Pascoe in which he rejected the Bar's pronouncement that the advertisement was inappropriate. It was the letter, therefore, not the one-time advertisement, that subjected him to public reprimand. Three justices felt that the punishment on this count was too severe. Id. at 914 (Barkett, Shaw, and Kogan, JJ concurring).

All indicators are that in 1990, the pattern of inappropriate conduct by some lawyers will continue, and that it is unrelated to advertising. Nine new disciplinary actions were reported in the Jan. 1, 1990 edition of The Florida Bar News. The offenses were: felony conviction (RICO--money laundering in a drug smuggling operation); felony conviction (tax fraud and aiding and abetting the importation, possession and distribution of marijuana); appearing at a pre-trial conference and at a hearing while intoxicated; financial misconduct (2); neglect of legal matters (2); failing to consult with client before accepting an offer of settlement; and practicing law while suspended for failure to pay Bar dues.

In other states, the low incidence of attorneys disciplined for advertising infractions parallels the Florida experience. Herbert J. Friedman, 1988-1989 Chairman of the ATLA Advertising Policy Committee, compiled data from the

National Discipline Data Bank of the American Bar Association Center for Responsibility from 1977 to 1988. (CAC App. 5). The national incidence of discipline for advertising is nearly non-existent, and clearly statistically insignificant. In a twelve-year period, 31,553 attorneys were disciplined; only 50 cases--0.158 percent--involved advertising. Since 1985, when nine of 3,318 disciplinary actions involved advertising, the rate has dropped each year. In 1986, the rate was seven out of 3,613; in 1987, it was six in 4,023; in 1988, only two out of 4,186 disciplinary actions--0.048 percent--were for advertising. From these data, Friedman concluded that "if there were complaints about lawyer advertising, they were not coming from the public." (CAC App. 5).

Florida, like other states, has the mechanism to regulate lawyer advertising which is not constitutionally protected because it is false or misleading, and thereby harmful to the public and to the profession. This system must be working, because in the thirteen years since Bates sanctioned lawyer advertising, only three public reprimands have been issued for advertising--and two of those were against out-of-state lawyers. If The Florida Bar is concerned with the public image of lawyers and that image's effect upon the administration of justice, the unfortunate array of unprofessional and unethical lawyer conduct reported by the public press, this Court, and by other states compels the conclusion that that suppression of misconduct, not suppres-

sion of speech, is the sine qua non for saving the profession's image.[12/]

B. Florida Jury Verdicts Continue To Provide Plaintiffs With Relief Despite Any Negative Public Attitude Toward The Legal System From Any Source

One indicator of the public's attitude toward the legal system is the activity of that system, and how well it serves those who seek legal redress of their injuries. The ever-increasing number of cases filed in Florida indicate that the public is seeking out the legal system. See, Florida Supreme Court Summary Reporting System, Circuit Court Summary Reports, 1986-1989. (CAC App. 6). Jurors,

12/ The Bar's Affidavit of John Berry (Bar App. H(5)) confirms both the dearth of advertising discipline problems and the fact that if any problems exist, they have been adequately handled by The Bar under the existing Rules. The charts attached to Berry's Affidavit purportedly reflect "Discipline Statistics from 7/01/86 through 6/30/89." They show 426 "Total Disciplines" in a myriad of areas (neglect, fees, trust accounting, conviction, misrepresentation, personal behavior, incompetence, conflicts, interfering with justice, non-cooperation) and only 6 "Disciplines" in a category called "Solicitation/Advertising." There is no way, short of discovery and trial examination, to determine whether indeed all of the six were for solicitation, not advertising. The lumping together of both categories makes an accurate assessment impossible.

Berry, apparently recognizing the data's shortcomings from The Bar's point of view, offers his unsupported personal view that in 1985-1986 "approximately 300 advertising cases were handled by The Bar, with "many" resulting in cease and desist agreements." Bar App. H(5), p.1. Berry's silence post-1986 suggests that advertising has not been a "problem" since then; his vagueness as to the 1985-86 data suggests that advertising may not have even been a "problem" then. The charts containing more recent data confirm, or at least strongly suggest that advertising has not been a problem since 1986.

drawn from that same public, award frequent substantial verdicts to plaintiffs. Like most institutions, our legal system deserves and receives both criticism and praise. But the critics, including opponents of lawyer advertising and increasing commercialization, cannot demonstrate that these developments have hindered the administration of justice. In fact, the system is working well.

Most lawyer advertising seeks to communicate with tort victims. Those victims' successes in the courtroom, state-wide, suggests that juries are not tainted by lawyer advertising. In one month alone, November 1989, juries in thirteen Florida counties awarded verdicts for plaintiffs in amounts exceeding $100,000.[13/] 10 F.J.V.R. 11 (1989). Seven of twenty-four such verdicts were in excess of one-million dollars. Id. Studies have shown that juries neither deny recovery nor award large verdicts capriciously.

A study of Cook County, Illinois jury verdicts in personal injury cases from 1959 to 1980 found that the average award was consistently modest and stable. Pavalon, Poisoning the Well: First Amendment Rights Versus Right to Fair and Impartial Juries, 15 (9) ATLA Advocate 8 (1989) (criticizing insurance industry advertising attacks on the "lawsuit crisis"). Research from the American Bar Founda-

13/ Cases per county were reported in the Florida Jury Verdict Reporter as follows: Alachua (2), Brevard (1), Broward (1), Dade (3), Hillsborough (4), Leon (2), Madison (1), Marion (1), Orange (1), Palm Beach (3), Pinellas (3), Santa Rosa (1), Sarasota (1). 10 F.J.V.R. 11 (Nov. 1989).

tion indicates that even in medical negligence cases awards are surprisingly modest compared to the amounts that jury critics claim. Id. These studies belie concerns that the fairness and impartiality of our jury system is in jeopardy.

The Bar's "Record" does not address the actual litigation evidence which supports the health and viability of the judicial system. The Bar prefers the anecdotal approach, but this Court's adjudicative process is best served by the data its courts produce. A review of court statistics and reported verdicts is more reliable than anything the Bar has offered, and confirms that the administration of justice will not be enhanced by, for example, banning "dramatizations" from all advertising, in any medium. Proposed Rule 4-7.2(e).[14/]

C. Individuals Who Obtain Legal Counsel Increase Their Recovery For Tort Claims Even Without Litigation

Insurance industry research confirms that attorney involvement in tort claims is of significant benefit to consumers. In a country-wide sample of over 46,000 paid automo-

14/ The Bar's hypocricy is evidenced by its willingness to use dramatizations to enhance its image in its television production "People's Law." Fla. Bar News, Dec. 1, 1989, p.6. Apparently The Bar recognizes that dramatizations can motivate people; it is willing to try to motivate people to think well of lawyers, but unwilling to allow lawyers to motivate people to protect their rights and seek access to the judicial system. The Bar's schizophrenic approach to the First Amendment and Article I, §4 of the Florida Constitution raises concerns about The Bar's motives for seeking to effectively eliminate the kind of advertising it recognizes as productive and communicative.

bile injury claims surveyed by 34 auto insurers during the spring and summer of 1987, attorney involvement was associated with increased recovery. All-Industry Research Advisory Council, Compensation for Automobile Injuries in the United States (1989), p.5. Almost 45% of all persons who received payment during this period for an auto injury had hired an attorney to handle the settlement negotiations. Id. at 9. But 79.3% of total insurance dollars paid went to represented claimants. Id. at 87.

Florida (45.3%) was above the national median for attorney involvement (33.9%) while the range was from 65.7% (Maryland) to 14.5% (North Dakota). Id. at 83,85. States which have traditionally inhibited attorney advertising have lower attorney involvement, and lower recovery for those who are injured. In Iowa, only 16.9% of claimants were represented; Kentucky, 24.9%; Alabama, 15.4%. Id. at 85.

In 1977, before Bates, only 31% of auto injury claimants (nationally) had attorneys. Id. at 9. This percentage has increased substantially, and the increase has been attributed in part to attorney advertising. Id. Thus, advertising serves consumers by resulting in greater recovery for a greater number of people in auto injury claims.

D. Consumers Benefit From Truthful, Non-Misleading Advertising

The purpose of the limits put on commercial speech is to protect the public. If some limits provide protection, and that is good, it does not necessarily follow that

more limits, i.e. more "protection," is better. In fact, the imposition of excessive limits may have the opposite result, depriving the public of the benefits which the advertising can provide. The balance between protection and impermissible restraints on commercial speech has developed largely from the Supreme Court's line of cases starting with Bates v. State Bar of Arizona. The Federal Trade Commission (FTC) has sought to guide commercial and public interests into proper use of the Court's guidelines.

The FTC works to prevent unfair methods of competition and unfair or deceptive commercial practices pursuant to Title 15 U.S.C. §§41 et seq. Its goal in this area is to identify and encourage the removal of restrictions on speech that impede competition, increase costs, and thereby harm consumers without providing any countervailing benefits. Calvani, Attorney Advertising and Competition at the Bar, 41 Vand.L.Rev. 761,788 (1988) [hereinafter Calvani]; see, Zuckerman letter, infra.

A member of the Board of Governors of The Florida Bar requested the views of the FTC on the proposed amendments to the advertising Rules of Professional Conduct. Jeffrey Zuckerman, Director of the FTC Bureau of Competition, responded at length, suggesting that in general the proposed rules denied consumers a free and informed choice and were largely overbroad. Letter from Jeffrey I. Zuckerman to William F. Blews, Member, Board of Governors of The Florida Bar (July 17, 1989). (CAC App. 7).

Zuckerman commented on certain rules specifically. He suggested that proposed Rule 4-7.1(d), which would prohibit client testimonials entirely, should be amended or deleted. Id. at 4. Truthful testimonials from actual clients may be beneficial. A related "advertising" concept is found in the Martindale-Hubbell directory, where lawyers routinely identify major clients, suggesting that a firm is competent to handle complex matters. Id. The general public does not peruse Martindale-Hubbell, but could deduce the same type of competency from a truthful client testimonial. Zuckerman recommended amending the rule to prohibit only those testimonials that are likely to mislead, or deleting the rule and relying on the general prohibition in Rule 4-7.1 against "false or misleading communication." Id. at 4,5.

Zuckerman found overbreadth in the proposed rules against self-laudatory claims (4-7.1(e)), television advertising (4-7.2(b)), solicitation of another lawyer's clients (4-7.4(c)(1)(g)), and requiring a disclaimer in the ad (4-7.2(d)). Id. at 4-8. Such excessive restrictions would be costly to consumers, who use advertisements both to understand their legal rights and obligations and to identify attorneys who appear responsive to their needs. Id. at 6. Ineffective ads, constrained by overbroad rules, would not serve the interests of the public.

The proposed prohibition on self-laudatory statements fails to recognize that most advertisements are self-laudatory to some extent. Id. at 5. It would deprive consu-

mers of the very information they want (about the desirable aspects of a certain attorney's practice), and would remove the incentive for lawyers to offer different services or lower prices. Id. Alternatively, Zuckerman recommended that the scope of this rule should be limited to prohibit only misleading self-laudatory claims. Id.

Severe restrictions on television advertising are based on unsupported fears that it compromises the dignity and professionalism of the legal community. Zuckerman suggests that advertisements with graphics, dramatizations, reenactments, and similar techniques can help consumers get the message. Id. Concerns about television could be allayed by banning only those advertising techniques that have been affirmatively shown to be likely to mislead, while allowing other techniques that are the hallmark of the medium. Id. at 6. The Bar has not affirmatively shown that any of the proscribed techniques are, in and of themselves, harmful. If the message is not misleading, it should be allowed.

In general, the FTC Bureau of Competition disapproved of the proposed regulations that limit consumers' access to truthful communications.

That approach is consistent with this Court's recent decision involving commercial speech, Sakon v. Pepsico, Inc., _____So. 2d ____, 14 Fla.L.Week. 584 (Fla. 1989), where it noted that Florida laws on deceptive and unfair trade practices can regulate false, misleading, or deceptive

advertising, even without resorting to a First Amendment analysis. In Pepsico, this Court also implicitly recognized the public's ability to discern fact from fiction, and to respond intelligently to advertising.

In contrast, the Bar's Big Brother approach demeans the public and suggests stereotypical disdain for the intelligence of the low income, racial and ethnic minorities who utilize lawyer advertising instead of Martindale-Hubbell. The Bar's arrogance is both socially unacceptable and legally unsupportable.

E. The Commentators And The Consumers

Consumers receive the same benefits from lawyer advertising as from advertising for other products and services. Primarily, the information gained about the availability, nature, and price of the service allows for informed decision-making. McChesney, Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers, 134 U.Pa.L.Rev. 45,50 (1985). To meet this need, some form of advertising, in the guise of marketing, networking, or community involvement, will always exist. When one form is banned, lawyers and other professionals promote themselves through expensive but less effective means, such as country clubs, running for political office, and writing and promoting books. Id. at 79. The experience of other professionals, allowed to advertise after previously being forbidden, shows that marketplace

factors make traditional advertising preferable over these other surrogate means.

Optometrists, for example, began advertising and prices went down. Calvani, supra p.32 at 779-781. The price of legal services is a serious deterrent to middle and low-income persons, and any factor which could lower prices without compromising quality would serve the public interest. As long ago as 1978, an F.T.C. pilot study found that lawyers who advertised charged less. Id. at 783. Later studies have confirmed that restrictions on advertising resulted in increased prices for legal services. Id. By maintaining competition in the professional marketplace, prices are kept down. McChesney, supra at 78-79. Quality may, in fact, improve.

Three years after Bates, a Florida survey found no evidence linking lawyers who advertised with malpractice claims. Calvani, at 782. At that time, Florida had 25,000 lawyers and 300 annual malpractice claims. Id. None involved advertising lawyers. Id. These findings are supported by the lack of professional discipline of lawyers for advertising, discussed supra p.21. When they occur at all, complaints about professional advertising are from other professionals. Practically no consumer complaints are registered. Calvani, at 781. Perhaps name recognition increases a lawyer's need for accountability, and advertising decreases deception, rather than creates it, as opponents claim. Id. at 777.

The reasons for lawyer opposition to other lawyer advertising has been explained by Professor Geoffrey Hazard, Jr., who first divided lawyers by the type of legal services offered. Hazard, Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services, 58 N.Y.U. L.Rev. 1084,1100 (1983). Hazard views law practices as either standardizable or individualized, or a mixture. Standardizable services bring less profit per case, therefore more volume is needed for a practioner specializing in this area (simple divorces, wills, bankruptcies, personal injuries). Id. at 1100. Advertising is an effective way to increase volume, by stimulating a latent demand for those legal services. Id. at 1105. Individualized services (estate planning, securities, mergers, major criminal practice) are more complex, more expensive, and less likely to use advertising to recruit clients. Id. at 1105. Instead, clients find lawyers for these services either through personal knowledge or by reputation.

According to Hazard, the majority of firms have a mixed practice, and use standardizable services as loss leaders to attract the more lucrative individualized service clients. Id. at 1110. Attorney advertising permits the growth of firms with primarily standardizable practices, including young, less well-established firms, which then compete with the mixed-practice firms for those clients. Id. Since the established, mixed-practice firms have had greater power in the organized bar and in the political

system, they have been an influential opposition to lawyer advertising. Id. Under the guise of "professionalism" and "dignity," old-fashioned competition is the real issue.

The practice of law is changing. More practices are more specialized than ever before. A new faction, public interest lawyers, also favors advertising. Id. at 1111. As the mystique surrounding the legal profession is peeled away, consumers of legal services require the threshold of information that advertising can provide. Id. at 1105. The "new" clients, especially non-whites and persons of low and middle socioeconomic status, have no personal knowledge and fewer sources of reputation information about legal services. Id. at 1096. Advertising serves their needs.15/

15/ Alec Wilkinson in Big Sugar, writing about Jamaican cane cutters in Belle Glade, provides this vignette:

> [H]e was using one of the dream books for gamblers the cutters buy.. .to predict combinations in the numbers.... He was not going to play, he had no money, he was just passing the time. He was fairly sure that because of the length of his injury and the time he had missed at work he would not be asked back the next season. (He wasn't.) He had seen on television the advertisement of a West Palm Beach lawyer who he thought might be able to help get him a settlement from the grower for his injury.
>
> The New Yorker, July 24, 1989, p.56 (Big Sugar has since been published as a book by Knopf Publishers (1989). See also, ABA Commission on Advertising Report To The House of Delegates (CAC App. 4).

THE CASES COMPEL THE REJECTION OF THE BAR'S PROPOSED RULES REGARDING ADVERTISING

A. The Governing Principles

Lawyer advertising is no crime. Quite the contrary:

> Lawyer advertising is in the category of constitutionally protected commercial speech. See Bates v. State Bar of Arizona, 433 U.S. 350 (1977). The First Amendment principles governing state regulation of lawyer solicitations for pecuniary gain are by now familiar: "Commercial speech that is not false or deceptive and does not concern unlawful activities ... may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." Zauderer [v. Office of Disciplinary Counsel of Supreme Court of Ohio; 471 U.S. 626 (1988)] at 638.
>
> Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct. 1916 (1988).

Zauderer declared invalid Ohio's attempted discipline of a lawyer using an illustration to attract clients:

> The advertisements ... concerning the Dalkon Shield were... neither false nor deceptive, in fact they were entirely accurate.... The State's power to prohibit advertising that is "inherently misleading" see In re RMJ, 455 U.S. at 203, thus cannot justify Ohio's decision to discipline appellant for running advertisements geared to persons with a specific legal problem.

Zauderer, 471 U.S. at 647. The Zauderer court condemned "broad prophylactic rules" which threaten "the protections afforded commercial speech." Id. at 649. Zauderer distin-

guish d between dignity in the courtroom and dignit in the First Amendment arena:

> [A]lthough the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights.. .. [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.
>
> Zauderer, at 648.

The fountainhead case, Bates v. State Bar of Arizona, 433 U.S. 350,369-70 (1977) rejected the notion that advertising is "an unmitigated source of harm to the administration of justice." From Bates, to Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), to In re RMJ, 455 U.S. 191 (1982), to Zauderer, 471 U.S. 626 (1985), to Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988), the Supreme Court of the United States, and this Court (Fetterman, 439 So.2d 835 (1983)) have warned against state bar associations' attempts to limit lawyer advertising.

Only Ohralik upheld discipline -- discipline against a lawyer who engaged in personal solicitation, not in advertising in yellow pages, newspapers, direct mail, radio or television. An important reason for limiting Ohralik's right to communicate was the "unique.. .difficulties [which] would frustrate any attempt at state regulation of in-person

solicitation short of an absolute ban because such solicitation is not visible or otherwise open to public scrutiny." Shapero, 486 U.S. at 473.

Here The Florida Bar seeks strict regulation of public advertisers, advertisers who are already subject to this Court's stringent regulations which are consistent with Supreme Court standards.

Rule 4-7.1 "COMMUNICATIONS CONCERNING A LAWYER'S SERVICES" provides:

> A lawyer shall not make or permit to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
> (a) contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading;
> (b) is likely to create an unjustified expectation about results the lawyer can achieve or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
> (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Rule 4-7.3(e) "LEGAL SERVICE INFORMATION" provides:

> Any factual statement contained in any advertisement or any information furnished to a prospective client under this rule shall not be:
> (1) Directly false or misleading;
> (2) Impliedly false or misleading;
> (3) Fail to disclose material information;
> (4) Unsubstantiated in fact; or
> (5) Unfair.

Between those Rules and numerous others (see e.g 4-7.2; 4-7.3; 4-7.4; 4-7.5; 4-7.6; 4-7.7; 4-8.3 (reporting professional misconduct); 4-8.4), the Florida Bar has ample room to regulate the commercial speech of lawyers, consistent with the constitutional case law. Careful scrutiny of the proposed new rules reveals their true intent: to sacrifice lawyer advertising on the altar of the Bar's fragile ego.

B. The Proposed Restrictions

1. Testimonials and Costs Liability

Proposed Rule 4-7.1 adds a subsection prohibiting testimonials. The proposed comment says they mislead, and also makes costs liability a necessary part of an advertisement which mentions set or contingent fees. There has been no evidence demonstrating that ads not mentioning cost liability have misled the public. Indeed, if a client does retain a lawyer in a contingent fee matter, the client must be fully apprised of costs liability. The Bar's demand for costs information is met by the retainer agreement and the Statement of Client's Rights. Contingent fee contracts are already subject to very strict regulation. See Rule 4-1.5(F). The Statement of Client Rights which must be signed and kept by the client is extraordinarily detailed and protective of client interests. Even the telephone number of The Bar is provided to encourage dissatisfied clients to complain. (Statement of Client's Rights, CAC App. 8). The fact that The Bar produces no evidence of client claims

of being misled about costs because of advertising suggests that the real purpose of The Bar's proposed Rules is to load advertisements with burdens which increase the cost of the ad and thus deter lawyer advertisers.[16/]

With regard to testimonials, The Bar offers no competent evidence to demonstrate that testimonials are misleading. Indeed, a satisfied client is a lawyer's goal. If publication of that fact is misleading, unsubstantiated, unfair, impliedly false or fails to disclose material information, The Bar's existing Rules provide a basis for discipline. See, Rules 4-7.1, et seq., supra, p.21. The ban on testimonials merely serves as another device to achieve the Bar's goal of "dignified" advertising. Zauderer dispatched that rationale. 471 U.S. at 648.

16/ See also proposed Rule 4-7.2(h), requiring the lawyer to

> disclose whether the client will be liable for any expenses in addition to the fee. Additionally, advertisements and written communications indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall disclose (1) that the client will be liable for expenses regardless of outcome, if the lawyer so intends to hold the client liable; and (2) whether the percentage of the fee will be computed before expenses are deducted from the recovery.. ..

Reading the proposed Rules gives one some idea of the burden placed upon a radio or television advertiser using a thirty second advertisement. The affidavits of broadcasting executives (CAC App. 9) attest to the malignant effect of these burdens.

2. The Disclaimer/Disclosure

Proposed Rule 4-7.2(d) would make lawyers who advertise "on the electronic media" or who provide an illustration or more information than their name, rank and serial number (Proposed Rule 4-7.2(n)(1)(8)), place the following language in their ads:

> The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.

The Comment commands that the "warning label"

> ...in television advertisements ...must remain on the screen long enough to be read in its entirety by the average viewer, in print and television advertisements the type size used for the disclosure must be sufficient to cause the disclosure to be conspicuous, in radio or recorded advertisements (and in television advertisements, if the disclosure is spoken rather than displayed on screen) the disclosure must be spoken at a speed that allows comprehension by the average listener.

Thus the Bar would have advertising lawyers pay to advertise that advertising is not to be trusted. Whatever message the lawyer wishes to send would be burdened by the time and content restrictions demanded by the proposed rule. The Bar will likely say, as it has said during the course of this dispute, "Well isn't this true -- that you should not choose a lawyer solely by advertising?"

That question begs the issue. One could say you should not choose a lawyer solely through Martindale-Hubbell, or solely through the advice of friends, or solely through local bar referral organizations, or solely through news of a lawyer's great victory in a case, or solely through a lawyer's name, rank and serial number advertisement. But the Bar has chosen to say that if you advertise in television or radio, or use an illustration, you are condemned to provide a warning to consumers. The proposed burden has (1) no evidentiary record supporting its need; (2) no rational basis for discriminating between different forms of advertising (an equal protection denial), and (3) no legitimate purpose related to the administration of justice, jury trials, or any other purported "substantial interest" which the Bar must show even before it demonstrates the "narrowly tailored" fit of the rule to ward off some evil.

Simply put, the disclaimer/disclosure, on its own, and combined with the plethora of other burdens created by the proposed Rules, is designed to achieve one purpose: to stifle the voices of effective and communicative lawyer advertising.

3. The Factually Substantiated Illustration Rule

Proposed Rule 4-7.2(f) provides:

> Illustrations used in advertisements shall present information which can be factually substantiated and is not merely self-laudatory.

Whatever the exact meaning is of that language, it runs afoul of the First Amendment. Phil Zauderer ran an ad in 36 Ohio newspapers featuring "a line drawing of the Dalkon Shield accompanied by this question: 'DID YOU USE THIS IUD?'." The Ohio Bar charged him with violating a rule prohibiting illustrations and requiring "dignified" ads. The Supreme Court protected Zauderer:

> That our citizens have access to their civil courts is not an evil to be regretted; rather it is an attribute to our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal disputes. Accordingly, it is not sufficient justification for the discipline imposed on appellant that his truthful and nondeceptive advertising had a tendency to or did in fact encourage others to file lawsuits.
>
> Zauderer, 471 U.S. at 643.

Could Zauderer "factually substantiate" that the Dalkon Shield injured the women he sought to reach with his advertisement? A civil trial is the forum for that decision. Here, The Florida Bar forces the advertising lawyer to prove his case before he illustrates his point.

Once again one must ask the purpose for the "factually substantiated" test. If the illustration is directly or impliedly false or misleading, or unsubstantiated in fact or unfair (present Rule 4-7.3(3)) the Bar may commence proceedings against an offender. The only purpose

served by the proposed rule is to chill the communicative ability of lawyer advertising.

4. The No Dramatization Rule

Proposed Rule 4-7.2(e) provides:

> There shall be no dramatization in any medium.

Why? The comment seeks to "preclude ...suspense, scenes containing exaggerations.. .scenes creating consumer problems ...with the lawyer solving the problem." These are the same techniques The Bar is going to use in its own advertising campaign. See p.30,n.14, supra. If the dramatizations are misleading, etc., present Rule 4-7.3(e) will eradicate them. The "why" is because The Bar finds dramatizations undignified and motivational. The First Amendment and Article I, §4 of the Florida Constitution nullifies both reasons. The Zauderer Court believed that "deceptive or manipulative uses of visual media" can be addressed "on a case by case basis," rather than a broad prophylactic approach. 471 U.S. at 649. The Florida Bar's approach disdains the case by case route in its haste to broadly inhibit lawyer advertising.

5. The Single Voice Rule/
The Lawver Voice Rule/
The Instrumental Music Rule

Despite a record devoid of evidence of radio or television ads misleading clients by multiple voices, lyrics, or a statement made by someone other than the lawyer who will actually perform the legal service, The Bar

proposes that

> Advertisements on the electronic media such as television and radio.. .shall be articulated by a single voice, with no background sound other than instrumental music. ... [T]he lawyer appearing on screen must be the lawyer who will actually perform the service advertised unless the advertisement discloses that the service may be performed by others in the firm.
>
> Proposed Rule 4-7.2(b).

Is The Bar saying that an ad portraying questions and answers about legal problems (two voices) is misleading, inherently misleading or unfair? Is The Bar suggesting that the instrumental theme from Rocky or Star Wars is perfectly proper background sound as long as it accompanies a silver haired, silver tongued member of The Florida Bar proudly announcing his name, designation as a "Personal Injury and Wrongful Death" lawyer who speaks english, spanish, haitian patois, and the fact that he accepts credit cards? (See Proposed Rules 4-7.2(n)(1) (name); (n)(4) (foreign language ability); (n)(5) (fields of designation) see existing Rule 6-2.11, Schedule A for list of designated areas; (n)(7) (acceptance of credit cards)).

Does the Bar find that consumers of legal services are actually benefitted by having the lawyer appear on television to stand and hawk his wares with the theme from Rocky in the background? Does the Bar believe that lawyers should be chosen by their looks, and the mellifluous

sounds they can utter? Does the Bar believe that a client should be apprised of the advertising lawyer's race -- is that why the Bar insists the lawyer appear, in his or her own advertisement?

The proposed rule emphasizes superficiality over substance. It sacrifices communicative content to a cult of personality, and it cuts against minorities and the mundane looking lawyers (most of us) whose intellect might benefit potential clients, even if their appearance is not commanding.

The Bar probably hopes that forced appearances of the unlovely will force advertising from the airwaves. These proposed rules serve to reinforce the conclusion that they are another, albeit awkward, way of eliminating effective advertising.

6. The Geographic Location Rule

Proposed Rule 4-7.2(1) requires that

> All advertisements and written communications provided for under these rules shall disclose the geographic location of city or town, of the office in which the lawyer who will actually perform the services advertised principally practice law. If the office location is outside a city or town, the county in which the office is located must be disclosed.

This proposed rule, especially when combined with the fee forfeiture rule (see discussion below) creates the possibility that a client's best interests can be

protected only by unfairly losing one's fee. Should a Miami advertising lawyer attract a case which calls for special legal expertise in a discrete area, and the other lawyer hired to perform those services practices in Coral Gables instead of Miami, the proposed rule would be violated.

The "actually perform the services" limitation is clearly designed to inhibit advertising. As Professor Hazard points out, supra p.37, at 1100, the standardized practice requires volume to develop expertise and provide service at a reasonable cost for such services. By forcing the lawyer to: (1) portray himself or herself: (2) guarantee exactly by whom and where the services will be provided: (3) risk losing the fee if the advertisement does not conform to the case's future, the only safe advertisement is one for an individualized case (Hazard, supra) generating a large fee enabling the lawyer to devote all of his or her energies to make sure that his or her office in the advertised town actually performs the services.

That result is the antithesis of Bates, and makes a mockery of the advertising's consumer benefits. While there may be some rationale for simply informing clients of the county or counties in which the advertising lawyer generally practices, city or town location is merely another method by which The Bar seeks to burden advertisements with unnecessary information. In the days of municipal courts The Bar's city or town requirement might contain a seed of sense; today it is nonsense.

7. The Prior Restraint/Advisory Opinion Rule

Proposed Rule 4-7.5 (Evaluation of Advertisements) and the new Standing Committee on Advertising which it envisions (Proposed Chapter 15 - REVIEW OF LAWYER ADVERTISING AND SOLICITATIONS (NEW)) contemplate an expensive new police agency to enforce the Bar's proposed rules.

The Standing Committee is to be comprised of four lawyers and three public members. The latter are to be reimbursed by the Bar for "reasonable travel and related expenses associated with attendance at meetings of the committee." Proposed Rule 15-2.3. An advertising lawyer has two choices: ask the Committee for an advisory opinion at least 15 days prior to the ad's dissemination, or run the ad and file it with the Committee.

If the lawyer chooses the advisory opinion route, the Committee's positive advice will be a "good faith" defense to later grievance and fee forfeiture proceedings. Any negative Committee view of the ad can be offered as evidence against the lawyer in a grievance proceeding. Proposed Rule 4-7.5(h). An adverse grievance ruling, of course, can result in fee forfeiture. (Proposed Rule 3-5.1(h) and 4-1.5, discussed below). Thus, the lawyer is faced with a grisly Hobson's choice: seek the pre-publication approval of the Standing Committee, or fail to do so and risk invalidation of any contract and forfeiture of one's fees.

This is a special version of a prior restraint upon speech. The essence of a prior restraint is the imposi-

tion of a substantial burden upon a speaker's voice, prior to his speech. See, Florida Freedom Newspapers v. McCrory, 520 So.2d 32,35 (Fla. 1988). The advisory opinion rule violates that precept. Forcing an advertiser to first ask "permission" for his or her ad's approval, at the pain of losing his or her fee if any of the myriad new rules are violated, imposes a burden which violates the First Amendment and Article I, §4 of the Florida Constitution.

Given the already existing rules which protect the public from misleading, inherently misleading, unsubstantiated or unfair lawyer advertising (see p.21, supra), one must again ask what purpose is served by creating the cumbersome machinery of the Standing Committee. Forcing advertisers to submit copies of "videotapes, audiotapes, print, photographs of outdoor advertising," and a "transcript," and a "statement listing all media in which the advertisement or communication will appear, the anticipated frequency of use.. .in each medium.. .and the anticipated time period during which the advertisement will be used," and a $25 "fee" (i.e. tax) (Proposed Rules 4-7.5(d)(1),(2),(3),(4)) just impose more hurdles for advertising lawyers to surmount.

The Bar's claimed purpose is to assist it in monitoring advertising practices "for the protection of the public and to assist members of the Bar to conform" to the rules. The record belies any claim of public harm necessi-

tating this new "watchdog" agency: the Bar's "assistance" is part of its attempt to be a sheep in wolf's clothing.

8. The Fee Forfeiture/Invalid Contract Rules

Proposed Rule 3-5.1 provides that "The Florida Bar may order [a lawyer] to forfeit the fee or any part thereof." This severe economic sanction can be triggered by an order of this Court or "a report of minor misconduct adjudicating a client guilty of entering into, charging or collecting a fee prohibited by the Rules Regulating The Florida Bar." The new, direct connection to advertising is made by proposed amendments to Rules 4-1.5(A)and(1)) (Fees for legal services).

> (A) An attorney shall not enter into an agreement for, charge, or collect ... a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar.
>
> * * *
>
> (D) Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements unless...obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar.

The Bar's proposal attaches a high risk to the exercise of constitutional rights. Even the Bar's approved name, rank, serial number ads (Proposed Rule 4-7.2(n)(1)-(8)) could cause problems if a lawyer overstated his or her foreign language ability, or left out a word or two about

how fees were to be computed. Anything said beyond subsections (1)-(8) risks the fee forfeiture sanction, or, another round of litigation in which a client may seek to invalidate a fee agreement.

Indeed, one can envision a practice subspecialty of lawyers seeking out clients represented by advertising lawyers, and then suing to invalidate the fee agreement with the advertising lawyer.

The data provided by the Bar in John Berry's Affidavit (Bar App. H(5)) does not show a single lawyer discipline for advertising. It is shocking that the Bar suggests this new and extremely harsh remedy for an offense which has proven to be non-existent. Why? Because the Bar wishes to prevent successful. advertising in the future by intimidating those lawyers who might seek to effectively exercise their constitutional rights. This is the kind of "chilling effect" (Dombrowski v. Pfister, 380 U.S. 479,487 (1965)) which cannot be squared with the record or the case law, and this Court should, we respectfully suggest, reject the Bar's proposal.

THE RECORD SUBMITTED BY THE BAR DEMONSTRATES ITS PROSELYTICAL ZEAL AND SUPPORTS THE CONCLUSION THAT THE PROPOSED RULES ARE DESIGNED TO ELIMINATE OR CURTAIL LAWYER ADVERTISING IN FLORIDA

An initial Exhibit in the Bar's "Record" is Lawyer Advertising and Solicitation: Bar Leaders Background Booklet (August, 1989). Bar Appendix A(2). That exhibit contains a memorandum to Bar leaders so they can explain to the "local media" the Bar's position. It includes the Bar's "News Release" on lawyer advertising, and "News Conference Remarks" of Bar leaders. It emphasizes the (self-discredited) Myers, Nevada study as providing "strong evidence" against television advertising (App. A(2), Ben Hill III Remarks, p.2)), and quotes supportive newspaper editorials.

Thus The Bar, as is its right, seeks to mobilize public opinion against advertising. In its final Exhibit (Appendix L(3)) The Bar proudly provides the List of Out of State Bar Associations and Individuals Requesting Copies of The Florida Bar's New Advertising Rules. No one denies the right of The Bar to proselytize its views.[17/] The First Amendment and Article I §4 of the Florida Constitution guarantee The Bar and its leadership those rights.

17/ Discovery would demonstrate that Bar leaders have traveled the country carrying The Florida Bar's anti-advertising banner, and have candidly stated that they see this as a "test case" which, they hope, will reverse the Supreme Court's long-standing support for lawyer advertising. See also, Press Conference Remarks in Bar App. A(2).

The Bar's efforts exemplify its zeal and commitment. But the same constitutions protect advertising lawyers from over-zealous advocacy. This Court must measure the proposed rules against the "Record" and the relevant Supreme Court cases. Lists of interested inquirers, outdated, irrelevant, or unreliable "studies," press releases, news clippings, do not carry The Bar's position. Nor do the two state cases relied upon by The Bar as the last portions of its "Record" carry the weight assigned to them.

THE IOWA AND NEW JERSEY CASES DO NOT SUPPORT THE RULES THE BAR ASKS THIS COURT TO APPROVE

The Bar's submission of the Briefs and decisions in the Iowa and New Jersey lawyer advertising cases reflects The Bar's reliance upon those states' lawyer advertising rules.

The New Jersey Supreme Court's procedural handling of Petition of Felmeister & Isaacs, 104 N.J. 515, 518 A.2d 188 (N.J. 1986) supports our request for a remand. The New Jersey Supreme Court, faced with a challenge to new lawyer advertising rules

> ...remanded the matter to the trial court for the purpose of developing a fuller record.
>
> The parties before the trial court on that remand were petitioner, the Attorney General (acting as proponent of RPC 7.2 (a)), and the New Jersey State Bar Association, which was given permission to intervene. Numerous exhibits were introduced, including many forms of

> advertisements in all media and of all kinds. Both the State and petitioner produced experts.. ..
>
> After considering the testimony presented, the trial court submitted its Report and Recommended Findings of Fact.
>
> Id. at 191.

The New Jersey Supreme Court wrote:

> Our rulings here must confront the general constitutional requirement not always articulated, and not always followed, of factual proof of the existence of the legal justification for restricting free speech. Ordinarily it will not do simply to note the circumstances that, under Central Hudson, will justify restrictions on commercial free speech, and then "prove" their existence by logic, anecdote, or notions of what is "qenerally accepted." Record proof is-required. See, e.g., In re RMJ, supra.
>
> Ibid at 203. emphasis in original).

The New Jersey court did not demand "conclusive proof," but its decision to approve a lawyer advertising "pilot project" was primarily based upon "The record before us. ..." Id at 204. Thus the Court prohibited, inter alia "extreme portrayals," the kind of ad whose attention-getting technique depends upon its absurdity, its clear and intentional lack of relevance to the selection of counsel.... " Id at 202. The court's caution in granting temporary approval to some of the New Jersey Bar's proposed rules was evidenced by its permitting even "non-rational ads, within limits in both print and radio broadcast media"

(518 A.2d 204) to continue while a special committee was formed to inform that court about "the impact of attorney advertising and the impact of restrictions on attorney advertising."

Here, The Florida Bar, absent a developed record, absent any findings of fact made in a trial setting, absent any evidence of disciplinary problems caused by advertising, absent any evidence that the present Rules cannot protect the public, asks this Court to completely prohibit rational, reasonable advertising. The New Jersey Supreme Court temporarily adopted this one rule:

> RPC 7.2, Advertising (Reviewed)
>
> a. Subject to the requirements of RPC 7.1 a lawyer may advertise services through public media, such as telephone directory, legal directory, newspaper or other periodical, radio, or television, or through mailed written communication. All advertisements shall be predominently informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.
>
> 518 A.2d at 208.

The Florida Bar's proposal to this Court goes so far beyond the New Jersey case that New Jersey is no precedent for the Bar.

The Iowa decision fares no better. That case, Committee on Professional Ethics and Conduct of the Iowa State Bar Assoc. v. Humphrey, 355 N.W. 2d 565 (Iowa 1984), judgment vacated, 105 S.Ct. 2693 (1985) (Rehnquist and O'Connor, JJ, would note probable jurisdiction); reconsidered, 377 N.W. 2d 643 (Iowa 1985), appeal dismissed, Humphrey v. Committee on Professional Ethics, etc., 106 S.Ct. 2693 (1986) (White, Blackmun and Stevens, JJ, would note probable jurisdiction), pre-dated Shapero v. Kentucky Bar Association's strong affirmation that lawyer advertising "may be restricted only in the service of a substantial governmental interest and only through means that directly advance that interest." 108 S.Ct. at 1921,1924.

Second, the Supreme Court's dismissal of the appeal from the 377 N.W. 2d 643 (Iowa 1985) Humphrey decision does not carry the weight assigned to it by The Bar. A glance at the questions presented in the Appellants' jurisdictional statement reveals why the Supreme Court dismissed the appeal:

> 1. Do the standards established by this Court under the First Amendment for regulating lawyer advertising apply to advertising on television?
>
> 2. Are Iowa's rules banning "dramatic" voices and "self-laudatory" statements in lawyer advertising impermissibly vague, on their face or as applied?
>
> [Appellants' Juris. Statement, Humphrey v. Committee on Professional Ethics & Conduct (Feb. 11, 1986).]

Felmeister, 518 A.2d at 202, n.15.

The Court dismissed the appeal because the answers so obviously fail to present substantial federal questions. Television advertising is clearly within the scope of the First Amendment; "dramatic" and "self-laudatory" are not vague words. So whatever the "precedential" effect of the dismissed appeal, it is limited only to the questions presented, not to the issues raised by the Bar's proposed pervasive regulations at issue here.[18/]

Finally, Iowa's "tombstone" approach to television advertising is not precedent for anything in Florida. First, the state populations are distinctly different. Second, the Iowa decision does not address the myriad other advertising areas which the Florida Bar seeks to restrict. Third, the Iowa decision pre-dates Shapero. Fourth, Iowa's television rules were the product of "the exhaustive record

---

18/ The New Jersey Supreme Court addressed the Iowa precedent issue this way:

> In that connection we note that such dismissals do not have the same authority for the Court itself as decisions that are a product of plenary proceedings. Metromedia, Inc. v. City of San Diego, 453 U.S. 490,500, 101 S.Ct. 2882,2888, 69 L.Ed.2d 800,810 (1981); C. Wright, The Law of Federal Courts §108, at 758 n.25 (4th ed. 1983), and that commentators have argued that these dismissals should have little weight because they really do not differ greatly from denials of certiorari, see, e.g., Comment, "The Precedential Weiqht of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda," 76 Colum.L.Rev. 608, 511 n.19, 518-19 (1976).
>
> Felmeister, 518 A.2d at 202, n.16.

made in the public hearings before our ethics committee." 377 N.W. 2d at 646. That committee, included "two lay members" appointed by the Iowa Supreme Court. 355 N.W. 2d at 568, n.2. It held hearings, "undertook considerable study" and filed a report in January, 1980, which the Iowa Supreme Court studied for months before adopting. Id. Based upon the "exhaustive record" the approved rule prohibited television advertisements "which contain background sound, visual displays, more than a single, non-dramatic voice or self-laudatory statements." 355 N.W. 2d at 566. Here the Florida Bar never conducted any public inquiry regarding television or radio, save the self-serving "studies" it commissioned while, and after it decided to curtail these media. Finally, the Iowa television rules have since been shown to have a chilling effect on commercial speech (see, Affidavit of Larry Edwards, Executive Director of the Iowa Broadcasters Association (CAC App. 9), and to limit recoveries for injured Iowa citizens. See, Compensation for Automobile Injuries in the United States, discussed at p.31, supra. Neither of those results square with the guarantees of the First Amendment or The Florida Constitution's Article I, §4 (Freedom of Speech) or Article I, $21 (Access to Courts).

And of course, neither the Iowa nor the New Jersey decisions justify the Bar's proposed limitation of all other forms of advertising, including direct mail advertising -- a form of advertising explicitly and just recently protected

by the United States Supreme Court in Shapero v. Kentucky Bar Association, 486 U.S. 466, 108 S.Ct. 1916 (1988).[19/]

CONCLUSION

For all the foregoing reasons, this Court should deny the Bar's Petition to Amend the Rules Regulating Advertising. In the alternative, this matter should be remanded to a Special Master so that the opponents can have the right to be heard, and to confront and cross-examine the Bar's "evidence," so that findings of fact can be made regarding whether the Bar has proven the substantial interest and narrow fit necessary to attempt to limit speech protected by the United States and Florida Constitutions.

Respectfully submitted,

BRUCE ROGOW
Florida Bar No. 067900
2441 S.W. 28th Avenue
Fort Lauderdale, Florida 33312
(305) 524-2465

Counsel for
Citizens Against Censorship

19/ We have not detailed the flaws in the Direct Mail Rule (Proposed Rule 4-7.4(b)) because Shapero so clearly covers the protection to be accorded that form of advertising. We do note that the Bar's initial impetus was to limit direct mail advertising, and much of its "record" relates to that area. Television and radio, the media subjected to the harshest limitations, were added to the Bar's agenda during the latter stages of the Bar's excursion. See, Hill Affidavit, App. A(1).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Brief Of Citizens Against Censorship Opposing The Florida Bar's Petition To Amend The Rules Regarding Advertising And Alternative Motion To Remand This Matter To A Special Master To Make Findings Of Fact And Conclusions Of Law Regarding Whether The Bar's "Record" Provides Evidence Of The Substantial Interest It Claims" has been furnished to (1) K. PATRICK MEEHAN, Esq., LEIBOWITZ & SPENCER, Suite 501, 3050 Biscayne Boulevard, Miami, Florida 33137, (2) ALAN SUNDBERG and SYLVIA WALBOLT, 215 South Monroe Street, Tallahassee, Florida 32302, and (3) JOHN F. HARKNESS, JR., The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, by U.S.Mail this 20th day of January, 1990.

Bruce Rogow

BRUCE ROGOW

lm-d62/63